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Once More on the Perpetual Guardianship of Women

PAUL J. DU PLESSIS

ABSTRACT

The aim of this short piece is to investigate a statement by Gaius in his Institutes concerning the motivations for the perpetual guardianship of women in Roman law. Using a structuralist approach, the main argument put forward in this piece is that Gaius' statement should be viewed within the context of larger social forces at work in Roman society.

No volume devoted to the theme of ‘family and family property’ would be complete without a contribution focusing on one of the most perplexing areas of Roman family law, namely the perpetual guardianship of women. This topic, which has been studied by a number of authors,¹ has conventionally piqued the interest of legal historians owing to a text by the second-century jurist, Gaius:

Gai. 1, 190

Feminas vero perfectae aetatis in tutela esse fere nulla pretiosa ratio suasisse videtur. nam quae vulgo creditur, quia levitate animi plerumque decipiuntur et aequum erat eas tutorum auctoritate regi, magis speciosa videtur quam vera: mulieres enim quae perfectae aetatis sunt, ipsae sibi negotia tractant, et in quibusdam causis dicis gratia tutor interponit auctoritatem suam; saepe etiam invitus auctor fieri a praetore cogitur.

There seems, on the other hand, to have been no very worthwhile reason why women who have reached the age of maturity should be in guardianship; for the argument which is commonly believed, that because they are scatterbrained they are frequently subject to deception and that it was proper for them to be under guardians’ authority, seems to be specious rather than true. For women of full age deal with their own affairs for themselves, and while in certain instances the guardian interposes his authorisation for form’s sake, he is often compelled by the praetor to give authorisation, even against his wishes. [Gordon Robinson translation]

This text, in which Gaius expresses doubt as to whether the current state of the law in the mid-second century CE is satisfactory, contains two important statements. The first of these is Gaius’ summary of an important «popular opinion» regarding the reason for the existence of the rule; the second is an observation about «reality» as opposed to «law». It is these two statements that will form the focus of this contribution. But before these matters can be addressed, a few comments about the nature of the source are required. In its previous publications, the LDAS (Legal Documents in Ancient Societies) Group has tended to focus on «documents» in a narrow sense (letters, instruments of commerce) with a view to expanding existing knowledge of law and, more specifically, legal practice. In this contribution, I wish to advocate the inclusion of a legal treatise as a «document» for the purposes of this type of study. My reasons for doing this are twofold. The first is the nature of Gaius’s *Institutes*. It is the only nearly complete legal treatise from Antiquity in existence and therefore provides a unique perspective on legal literature of the «classical period». In second place, as modern scholars increasingly begin to suggest that Roman legal literature could also be treated as literary texts and therefore subjected to

¹ For a survey see DIXON 1984; LAMBERTI 2011; 2014.

the same modes of historical enquiry as, say, Livy or Horace, a fresh look at these may provide new insights.²

It is not my intention to provide a complete overview of the law regarding the perpetual guardianship of women in Roman law as this has been comprehensively explored by a number of authors.³ Rather, I wish to stress three broad lines of development in the law on guardianship of women that accounts for Gaius's statement in the mid-second century CE. The first point to make is that the Romans regarded it as a uniquely Roman phenomenon.

Gai. 1, 193

Apud peregrinos non similiter, ut apud nos, in tutela sunt feminae; sed tamen plerumque quasi in tutela sunt: ut ecce lex Bithynorum, si quid mulier contrahat, maritum auctorem esse iubet aut filium eius puberem.

Among foreigners, women are not in guardianship in the same way as with us, yet they are for the most part in a sort of guardianship; see, for example, the statute [law] of the Bithynians which orders that if a woman enters into a contract her husband or her adult son must give authorisation. [Gordon Robinson translation]

This comment by Gaius is interesting for at least two reasons. First, it locates Roman guardianship of women within the larger context of the legal cultures of the Mediterranean (an early form of comparative law).⁴ This is not an unimportant point as, according to Gaius's account of the sources of Roman law in the first paragraph of his book, Roman law consisted of three overlapping spheres of law, the smallest of which was the *ius civile*, followed by two larger spheres, the *ius gentium* and the *ius naturale*.⁵ From Gaius's statement about guardianship of women, it is clear that the matter originated from the *ius civile*, but that it was at the same time compatible with the *ius gentium* of the surrounding legal cultures. This may also explain the comment, discussed more fully below, that according to popular perception, it was fair (*aequum est*), that all women should be under perpetual guardianship.

The second point is that the law of perpetual guardianship of women was intimately connected to social expectations in Roman society regarding the making of a will and the social context of the larger *familia* that surrounded every marriage in Roman law.⁶ The normal expectation was that matters of

² See generally POTTER 1999.

³ DIXON 1984; LAMBERTI 2014 for a survey of the literature.

⁴ For a survey of what the Romans perceived to be the position among the Germanic tribes, see Tac. *Germ.* 18–19.

⁵ Inst.Gai.1.1.

⁶ GARDNER 1991; MILNOR 2011; RAWSON 2013.

guardianship of women would be resolved according to the instructions of the testator as described in a valid Roman will. It was only where the will had failed (or no will had been drafted), both exceptional circumstances, that the Roman State intervened through the Praetor to appoint a guardian.

The third and most important point is that from a relatively early point in the development of the law on perpetual guardianship of women, a woman could influence the appointment of a guardian in a variety of ways.⁷ The earliest form of intervention was where a widow, who had been married with *manus*, was permitted in her late husband's will to choose her own guardian (*tutor dativus*). This seems to have been permitted from c. 186 BCE. It is not altogether clear why women were given such freedom in these circumstances, but Gardner convincingly speculates that social pressure from the surrounding *familia* and the fact that widows in these cases would not inherit much property rendered this provision less important than it would appear at first glance. Here, the social reality of Roman families should not be forgotten. As Rawson states:

Most men at Rome probably did not marry until they were in their mid to late twenties (early twenties for elite families), about ten years older than their spouses.⁸

To this may be added that the consent of the guardian was only really required for commercial transactions involving *res Mancipi*.⁹ As the number of *res nec Mancipi* grew during the course of the Republic, one must assume that the number of occasions on which the guardian's consent was required declined substantially.

The final legislative intervention in the law of perpetual guardianship of women occurred during the reign of the Emperor Augustus who allowed women to be freed from the requirement of guardianship by successfully petitioning to be granted the dispensation of the *ius trium liberorum* (four children in the case of freedwomen). It also became possible for women to petition to be made *sui iuris*, therefore dispensing with the requirement of having a guardian. According to Gardner, this was the final nail in the coffin for the institution as it became almost impossible to enforce thereafter.¹⁰ It has to be noted, though, that 3 (or 4) children was a high price to pay for a Roman woman. As Rawson states:

⁷ For a survey of this development, see GARDNER 1991, 14–18.

⁸ RAWSON 2013, 96.

⁹ GARDNER 1991, 18.

¹⁰ GARDNER 1991, 21.

It might take a couple six successful pregnancies to achieve three live children who would survive beyond early childhood. Wives could die in childbirth, and remarriage for the widowed husband would not have been easy if, as is often claimed, the proportion of females in the population was reduced by the practice of abandoning ('exposing', the practice of *expositio*) more female babies than males.¹¹

Be that as it may, it seems to have still been current law in the time of Gaius by the mid-second century CE and, according to Schulz, was only finally scrapped from the law books during the reign of Justinian.

To the legal historian, this presents an interesting question. Why, if the law was already practically unworkable by the reign of Augustus, did it remain on the books for some time thereafter? Does this necessarily show that law was out of step with reality and remained as such for a few centuries?¹² Given the innate conservatism of law in general, and Roman law in particular, this is certainly a possibility. To this may be added the importance of cultural convention. Others such as Schulz maintain that it was merely by accident that the Romans did not abolish perpetual guardianship of women:

One may justly raise the question as to how this *tutela* could be preserved throughout the classical period although its abolition was already due at the end of the Republic, but the answer is very simple. During the troublous [sic] times of the late Republic the Romans did not find time to abolish it, and the reactionary legislation of Augustus could certainly not be expected to do so.¹³

Schulz's argument, while interesting, does appear somewhat unconvincing. It seems hardly likely that the Roman lawgivers «forgot» to abolish it. Rather, as I will argue in the remainder of this piece, there may be more to this apparent oversight that first meets the eye. In order to do so, we must return to the reasoning of Gaius in the text quoted at the start of this piece.

Let us take the issue of «popular» perception first. According to Gaius, there was a popular perception that it was fair (*aequum est*) that women of age should be subject to guardianship owing to their *levitas animi*. This popular perception, according to Gaius, was more specious than true (*magis speciosa ... quam vera*) and therefore could not be said to be a sufficient reason for maintaining the existing state of the law whereby women of age should be subject to guardianship. It is this popular perception that requires further investigation.

In his investigation of this popular perception, Schulz showed that the notion of the *levitas animi* of Roman women was most likely based on an Aris-

¹¹ RAWSON 2013, 96.

¹² GARDNER 1991, 5; PARKIN & POMEROY 2007, 72.

¹³ SCHULZ 1954, 181.

totelian notion first adopted by Cicero and thereafter repeated by a number of Latin writers during the course of the Empire.¹⁴ This then means that it was not the «original» justification for the introduction of the legal rule. Rather, it was a subsequent «popular» justification based on a Greek *topos* that had arisen in the late Republic (a period of profound change in the legal position of women in Roman society).¹⁵ Furthermore, according to Schulz, such a view could not be reconciled with the changes introduced by the Augustan legislation:

If the *infirmitas sexus* were a fact the *ius liberorum* would have been a punishment and not a reward, since the granting of the *ius liberorum* could not possibly remove this infirmity.¹⁶

Thus, this comparatively recently introduced «popular» justification for the perpetual guardianship of women did not reflect the realities of the second century CE. Not only did it not reflect the realities of the period, it was also, according to Schulz, wrong as far as the original justification for the rule was concerned. After investigating a passage from Livy, our main source for early Roman law, he concludes:

This is the basis of the Roman tutelage of women; ... this tenet of old Roman custom: public life is exclusively the business of the man; it forms part of his *officium*. ... However the emancipation of women during the last century B.C. resulted in the overthrow of this old Roman custom.¹⁷

This then, according to Schulz was the real reason for the introduction of the notion of perpetual guardianship of women: ancient Roman custom, bound up with perceptions of different spheres of work for men and women. This would also be compatible with Gaius's observations elsewhere that guardianship of women originated from the *ius civile* and was a uniquely Roman institution.

But if this was the true motivation for the introduction of this rule in the first place and it had, by the second century CE become out of step with the factual reality in the Roman society, it must be asked why the Roman lawgivers chose to retain it. To that end, Culham observes:

Perhaps men retained a pointless legal institution to preserve the appearance of male authority over property.¹⁸

¹⁴ SCHULZ 1954, 180-181; GARDNER 1991, 21.

¹⁵ See generally CULHAM 2004; TREGGIARI 2005; LAMBERTI 2011; MILNOR 2011.

¹⁶ SCHULZ 1954, 182.

¹⁷ SCHULZ 1954, 183. See also DIXON 1984, 356-371

¹⁸ CULHAM 2004, 151-152.

This statement cuts to the heart of the issue. On face value it would seem that the Roman lawgivers (exclusively male), chose to preserve a legal institution that in practice had long since become difficult to operate mainly because it preserved the Roman sense of the 'natural order' of men's work and women's work.¹⁹ It is difficult to deny that there might be some elements of this reasoning behind the retention of this law. But perhaps one should also view this statement of Gaius from the perspective of Eugen Ehrlich's notions of «dead law» vs. «living law». When does «living law» become «dead law»? This is a difficult question to answer, but, I wish to contend, that this text by Gaius provides us with the Roman answer to this problem.

Structurally, Gaius' statement may be set out as follows. The existence of Rule A is [or has come to be] popularly justified by Reason B. Reason B [in the view of Gaius] is more specious than real. An example of the practice of this rule is given. This structural analysis of the rule clearly shows the problem. Rule A [the perpetual guardianship of women] is an old rule from the *ius civile* that was introduced in the mists of time. Whatever its original motivation may have been from a legal perspective (Roman *mores* and the allocation of spheres of «work»), the legal justification for the rule and the subsequent popular justification for it were incompatible. This, combined with the increased social emancipation of women and the practical manifestation of their abilities to manage their own assets without the need of a guardian, eventually led to a crisis of confidence in the continued existence of the rule. This statement by Gaius also demonstrates another facet of the interaction between law and society quite nicely. Legal reasoning and popular reasoning are not the same, but popular perception as to the motivation for legal institutions can do much to demonstrate when legal institutions become out of step with social perceptions.

Finally, this text by Gaius also shows an interesting moment in the life of a legal rule. Here, a legal rule fell out of step with reality. This happened in three stages. First, the legal rule was enforced (because it was in step with society). Then society changed and the legal rule applied to fewer scenarios than before. And yet the force of tradition did not permit its complete abrogation. Rather, law and reality became out of sync, thereby also providing an opportunity for the rise of popular [if spurious] justifications for the rule. Once popular perception and factual reality had begun to undermine the rule, the Roman lawgivers had little option but to let it fall into desuetude (the preferred method of dealing with ancient rules). It would take the reformist tendencies of a Justinian to finally sweep it from the books.

¹⁹ See generally LENDON 1997; McDONNELL 2006.

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